

GEORGIANNA L. DANKS
v.
ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-63-A

Decided June 12, 1991

Appeal from a decision distributing compensation for water use.

Affirmed.

1. Indian Probate: Inventory: Property Erroneously Excluded or Included--Bureau of Indian Affairs: Administrative Appeals: Generally

Corrections to inventories in Indian estates may not be pursued through administrative appeals of unrelated Bureau of Indian Affairs decisions.

2. Administrative Procedure: Burden of Proof--Bureau of Indian Affairs: Administrative Appeals: Generally

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

APPEARANCES: Georgianna L. Danks and Edward S. Danks for appellant; Priscilla A. Wilfahrt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for appellee; Patricia Dunn Johnson, Esq., New Town, North Dakota, for the Three Affiliated Tribes of the Fort Berthold Reservation; Fred Gunn, Lester Lone Bear, Bernadine Young Bird, Naomi Foolish Bear, Benita Lone Bear, George Bruce, Jr., Malcolm Bruce, Sr., Annabell Lucy, and Gene Bruce, pro sese.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Georgianna L. Danks seeks review of a January 29, 1990, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), distributing compensation for water use among owners of three allotments on the Fort Berthold Reservation. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

In connection with a road construction project on North Dakota Highway No. 22, the contractor, Holen Construction Company (Holen), sought

permission from BIA to draw water from a small body of water located on Allotments Nos. 607A, 531A, and T531A, all within sec. 29, T. 152 N., R. 94 W., Fifth Principal Meridian, McKenzie County, North Dakota, on the Fort Berthold Reservation.

Appellant owns an undivided 13/63 interest in Allotment No. 607A. The remaining interests in that allotment are owned by the Three Affiliated Tribes of the Fort Berthold Reservation (Tribe) and other individuals. Allotment No. T531A is owned by the Tribe. Allotment No. 531A is owned by the heirs of Fred S. Gun. 1/ Appellant and her husband, Edward S. (Sollie) Danks, evidently farm all or part of Allotment No. 607A under some kind of "owner's use" arrangement; the details of the arrangement are not shown in the record.

During June 1988, the owners of the three allotments signed forms consenting to a temporary right-of-way to Holen for a surface waterline and removal of water. Appellant signed a consent form on June 27, 1988, but added a handwritten note: "\$2700 goes to me Georgianna Danks of the \$10,000.00 for water payment."

Holen deposited \$10,000 with BIA on June 27, 1988. Construction evidently took place during the summer of 1988. On September 7, 1988, Holen agreed to BIA's retention of the entire \$10,000 deposit for distribution to the landowners. The Superintendent, Fort Berthold Agency, BIA, signed a formal right-of-way document on September 19, 1988, granting Holen a temporary right-of-way for a surface pipeline and removal of 6,000,000 gallons of water, for compensation in the amount of \$10,000.

Holen and appellant's husband entered into a separate agreement on June 27, 1988, in which Holen agreed to compensate Danks, apparently in the amount of \$4,300, 2/ for surface damages caused by laying the water pipe. This agreement is noted in the right-of-way document signed by the Superintendent: "A surface water pipeline of eight inches in diameter will cross Allotment 301-607A * * * to convey water from the dam to the construction site. Holen Construction has negotiated with Sollie Danks for crossing his summer fallow field."

BIA determined the distribution of the \$10,000 water use payment among the landowners by calculating the percentage of water to be drawn from each of the three allotments, based on the surface underlying the body of water as shown on aerial photographs. By this method, the Superintendent determined that the owners of Allotment 607A would receive \$4,791; the Tribe as owner of Allotment T531A would receive \$1,071, and the owners of Allotment 531A would receive \$4,138. By letters dated September 30, 1988, the

1/ Most of the ownership interests, including appellant's, are for the surface only.

2/ The amount of compensation to Danks is not legible on the record copy of this agreement. The Area Director states in his brief that Danks was paid \$4,300 by Holen. Appellant has not refuted that statement.

Superintendent notified each of the owners of the distribution and informed them that they were entitled to appeal. The Superintendent's letter to appellant also stated:

The Consent of Owners to grant Right-of-Way which you executed on June 27, 1988 requesting \$2,700.00 for your share of the water payment is hereby denied in view of protecting the remaining landowners and the Three Affiliated Tribes' interests. The amount requested is over one-half of the designated amount for the landowners in Allotment 301-607A.

Appellant appealed to the Area Director, contending that the owners of the other two allotments were not entitled to share in the payment because a dam on Allotment No. 607A had been paid for by appellant's father, George Many Ribs Bruce. In a decision issued on January 29, 1990, the Area Director altered the payment distribution slightly, but affirmed the Superintendent's method of distribution. Under the Area Director's decision, the owners of Allotment No. 607A were apportioned \$5,000; the Tribe as owner of Allotment No. T531A, \$1,000; and the owners of Allotment No. 531A, \$4,000. ^{3/} Appellant requested clarification of the decision and, on March 5, 1990, the Area Director responded, stating:

My decision was based on review of the aerial photo, supporting documents, and "certain other factors" which included:

1) That approximately 50% of the dam lies within Allotment No. 607A and that the waterways are located on the other two tracts of land.

2) None of the landowners including the Tribe have proved beyond a reasonable doubt as to who constructed the dam, ownership, or its present user(s).

3) There are no approved business leases or easements on record to indicate a lessee of record. It appears that the dam is being used by various landowners in absence of any type of agreement(s).

4) Your appeal of October 26, 1988, indicated that you were entitled to "owners use," however the Tribe also voiced concerns by their letters of June 27, 1988, and September 2, 1988, as to protection of the fish population and restriction of water sale due to evaporation.

5) The Natural Resources Committee representing the Tribal Business Council and the Tribe as landowners in Allotment

^{3/} The Area Director apparently did not send copies of this letter to the other landowners on Jan. 29, 1990; he did, however, do so on Feb. 21, 1990. None of the other landowners appealed.

Nos. 531A-A/B and 607A took action to limit the sale of water to Holen Construction as indicated by their minutes in a meeting held on June 22, 1988.

Due to these factors I feel that my decision of January 29, 1990, will provide for an equitable distribution of the water payment among the three (3) tracts of lands involved and funds will be distributed to the landowners and the Three Affiliated Tribes according to their undivided interests in each of the tracts.

Appellant's notice of appeal to the Board was received on March 6, 1990. Briefs or statements were filed by appellant; the Area Director; the Tribe; and several of the other landowners, *i.e.*, Fred Gunn, Lester Lone Bear, Bernadine Young Bird, Naomi Foolish Bear, Benita Lone Bear, George Bruce, Jr., Malcolm Bruce, Sr., Annabell Lucy, and Gene Bruce.

Discussion and Conclusions

On appeal to the Board, appellant argues that the \$10,000 payment should be distributed as follows: (1) \$2,700 to appellant as damages to the summer fallow field; (2) \$4,371.04 to the estate of George Many Ribs Bruce as reimbursement for construction of the dam; and (3) the remainder to be divided among the landowners: \$1,464.48 to the owners of allotment No. 607A, \$292.89 to the Tribe as owner of Allotment No. T531A, and \$1,171.59 to the owners of Allotment No. 531A.

Appellant produces absolutely nothing to support her claim for \$2,700 in damages to the summer fallow field. Appellant's husband received \$4,300 directly from Holen for this purpose. It is clear from the right-of-way document that the separate agreement between appellant's husband and Holen was taken into account when the right-of-way was issued. The Board rejects appellant's contention that she is entitled to \$2,700 of the water payment to compensate her for damages to the summer fallow field.

With respect to her second claim, appellant asserts that, in 1954, her father had a dam constructed on Allotment No. 607A and paid for the construction with his own funds. She contends, therefore, that his estate should be reimbursed for the cost of construction before other landowners receive any of the water payment. She further contends that BIA has records concerning her father's construction of the dam but has been unable or unwilling to produce them. ^{4/}

^{4/} A July 18, 1990, memorandum from the Acting Superintendent, Fort Berthold Agency, to the Area Director states that copies of all documents related to the property and the dam had been furnished to appellant. The memorandum does not indicate the date on which most of the documents were furnished, although it states that some were furnished on Apr. 10, 1990. It is possible, therefore, that appellant did not have all the documents when she prepared her opening brief, which is dated June 26, 1990.

The Area Director argues that appellant has no standing to assert a claim on behalf of her father's estate, which was closed in 1971; that even if she did have such standing, the claim would be time-barred; and that even if the claim were not time-barred; appellant "has not produced any proof of expenses, when the dam was built, that her father built it, or that he sought or expected reimbursement for the costs" (Area Director's Brief at 4).

[1] Appellant does not allege that the claim she now seeks to pursue was listed as an asset of her father's estate. Essentially, therefore, she is asserting that the inventory in her father's estate was inaccurate because it failed to include the claim as an asset of the estate. It appears likely that such a claim, if it existed, would have been a non-trust asset subject to probate in tribal or state court. Whatever the case, however, and whatever rights appellant may have to seek an alteration to her father's estate, she cannot pursue the matter through an administrative appeal of an unrelated BIA decision.

Further, even if appellant could raise the issue in this appeal, she has presented no evidence whatsoever that her father paid for construction of the dam, let alone any evidence showing what the construction costs were or whether her father had any reason to expect reimbursement from the other landowners. ^{5/} The Board therefore rejects appellant's argument that \$4,371.04 of the water payment should be paid to her father's estate.

Appellant argued before the Area Director that the owners of Allotments No. T531-A and 531-A were not entitled to share in the water payment because the dam was located entirely within Allotment No. 607A. She has apparently abandoned that argument before the Board as she now concedes that the owners of the other two allotments are entitled to shares in the payment, albeit small ones. In any event, the Board agrees with the Area Director that the division of the payment was reasonably based on the percentage of the water located on each allotment, as shown by aerial photographs.

The Tribe and the other landowners urge affirmance of the Area Director's decision. Four landowners, who state they are appellant's siblings and/or interest holders in Allotment No. 607A, request the Board to order that appellant's share of the water payment be used to compensate the other landowners for the \$4,300 received by appellant's husband. This is, in essence, a request for damages. In addition, the landowners explicitly request the Board to award them damages against appellant with respect to the balance of the \$4,300. The Board does not address these requests because it has no jurisdiction to award damages. See, e.g., Gillette v. Aberdeen Area Director, 14 IBIA 187 (1986).

[2] In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not

^{5/} While appellant may not have received the BIA documents concerning the dam when she filed her opening brief, she had another opportunity to discuss them in a reply brief. She did not, however, file a reply brief.

supported by substantial evidence. E.g., Cheepo v. Acting Sacramento Area Director, 18 IBIA 131 (1990). Appellant has failed to carry her burden here.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Aberdeen Area Director's January 29, 1990, decision is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge